No. 73-1530

APR 1
MICHAEL ROD

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALVIN I. MALNIK,

Petitioner,

vs.

UNITED STATES OF AMERICA and CARL ROSEN, Revenue Agent of the Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO.

ALVIN I. MALNIK,

Petitioner,

vs.

UNITED STATES OF AMERICA and CARL ROSEN, Revenue Agent of the Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on February 8, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, dated February 17, 1972, is not reported, but is printed in full as Appendix A hereto. The opinion of the United States District Court for the Southern District of Florida, dated June 10, 1972, is reported at 348 F.Supp. 1273, and is printed in full as Appendix B hereto. The opinion of the United States

Court of Appeals for the Fifth Circuit, dated February 8, 1974, is reported at 489 F.2d 842, and is printed in full as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on February 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the Fifth Amendment claim against self-incrimination properly invoked only by interposing the privilege as to specifically propounded questions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the Constitution of the United States

> "No person . . . shall be compelled in any criminal case to be a witness against himself; . . ."

26 U.S.C. §7602

> "Examination of books and witnesses:
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of

such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

26 U.S.C. §7604

"Enforcement of summons:

(a) Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), 6427(e) 2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall

have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

STATEMENT

The principal petitioner in the district court was Internal Revenue Agent Carl K. Rosen who is conducting a tax audit of Alvin I. Malnik for the years 1959, 1960, 1962 and 1963. On March 16, 1971, Agent Rosen issued an Internal Revenue Service summons to the taxpayer pursuant to 26 U.S.C. § 7602. This summons required Alvin I. Malnik to appear and give testimony relating to his tax liability for the aforementioned years as well as to produce for examination certain books, records and papers.

The summons was directed to the taxpayer in his *individual* capacity only and not as a representative of a business entity in any form whatever, though he was requested, *inter alia,* to produce his records of corporations in which he was stockholder, officer and director. (App. 7)[1] The tax years covered by the summons included, at least in part, those years which were the subject of prior criminal tax proceedings instituted against the taxpayer. (App. 76)

On March 29, 1971, Harvey M. Silets, taxpayer's counsel, contacted Revenue Agent Rosen for the purpose of obtaining a continuance of taxpayer's appearance. The new agreed date was April 21, 1971. (App. 10) On April 20, 1971, Mr. Silets conferred with Agent Rosen by telephone and the date for compliance with the summons was continued from April 21, 1971 to May 4, 1971. (App. 12, 17) During the course of this conversation, Mr. Silets informed Mr. Rosen that the summons was "confusing and unclear on its

[1] Citation is to Appendix on appeal to the Fifth Circuit.

face", (App. 16), even in light of the letter sent by Mr. Rosen to Mr. Silets, dated March 29, 1971, attempting to explain the documents requested. (App. 20) On the same date, April 20, 1971, Mr. Silets also conferred with Mr. Holloway, Assistant Regional Counsel for the Internal Revenue Service. (App. 17) In this conversation it was agreed between the Internal Revenue Service and Mr. Silets, as counsel for taxpayer, that *in lieu* of the appearance of taxpayer on May 4, 1971, the Internal Revenue Service would accept a written statement directed to Mr. Rosen and signed by Mr. Silets and the taxpayer, indicating that taxpayer would claim his Constitutional privileges to such of the questions which were asked of him to which said privileges attached and to those of the records enumerated in the summons which were in his possession and to which the privileges attached. (App. 17) Mr. Rosen acknowledged this agreement in its entirety by his letter of April 20, 1971 to Mr. Silets, (App. 21), and Mr. Silets complied by directing a letter, dated April 21, 1971, to Mr. Rosen confirming the agreement. (App. 12, 13)

On December 7, 1971, more than seven months after the agreement *in lieu* of appearance, the Government filed its Petition to Enforce Internal Revenue Summons pursuant to 26 U.S.C. § 7604. (App. 4-14) Mr. Rosen's affidavit, which was attached to said Petition, was to the effect that petitioner "by letter dated April 21, 1971, . . . would make a blanket refusal to comply with the summons . . ." (App. 11)

In response to the Petition, taxpayer filed a verified answer which contained, *inter alia*, two affirmative defenses to the Petition. (App. 16-19) The first affirmative defense set forth the facts underlying the agreement in lieu of appearance as related hereinabove and asserted that the "summons was confusing and unclear on its face", (App. 16), while the second affirmative defense read in pertinent part as follows:

• • •

2. The records heretofore summoned are personal in nature to him and include individual, partnership and such copies of corporate records which may be in his own personal possession rather than those which may be held by him in some representative capacity of such corporation.

• • •

3. Respondent has claimed his privileges under the Fifth Amendment to the Constitution of the United States to such requested testimony and production of personal records in the same manner and as if he had personally appeared and been asked the questions to which such privilege attached and required to produce such records to which the privilege attached.

• • •

Initially, the district court entered an order directing compliance with the summons.[2] Subsequently, on June 10, 1972, pursuant to taxpayer's motion for reconsideration, the court reversed its position and ordered the dismissal of the Petition to Enforce Internal Revenue Summons, sustaining taxpayer's invocation of his Fifth Amendment privilege.[3] The district court specifically found that the agreement in lieu of appearance did not constitute a "blanket refusal" and noted further that the "agreed procedure was no more than a useful and commendable effort by both sides to avoid going through a mere formality." (App. 75) Taking cognizance of *Hoffman* v. *United States*, 341 U.S. 479 and *United States* v. *Coffey*, 198 F.2d 438, 440 (3d Cir. 1952), the district court held:

> "We conclude that under the setting in which the questions are sought to be asked and in light of the potential dangers pointed out by Respondent's counsel, it is apparent that even seemingly innocuous questions

[2] Opinion of the district court attached hereto as Appendix A.

[3] Opinion of the district court attached hereto as Appendix B.

relating to Respondent's tax liabilities for the instant tax years and the production of his records clearly suggest potential connecting links through which Respondent's answers might lead to and might result in his incrimination." (App. 80)

The Government then moved the district court to alter its order with regard to alleged corporate records. On July 6, 1972, the motion was denied on the grounds that the records sought therein were personal to the taxpayer and hence were covered by the protective cloak of the Fifth Amendment. In addition, the Court found that the summons was, in any event, overly broad and lacking in clarity. (App. 90-93)

Though rejecting the district court's reasoning, the Court below affirmed the dismissal of the enforcement petition on the ground that the mutual agreement between the Internal Revenue Service and Mr. Malnik that he need not appear pursuant to the summons constituted a waiver of any rights the Internal Revenue Service may have had.[4] As a footnote to its ultimate finding of waiver, the Court below stated that "[b]ecause we disagree with the reasoning of the district court, but affirm its judgment on a wholly different ground, we do not think that the doctrine of res judicata would preclude the IRS from issuing another subpoena pertaining to the same subject matter." The Court below concluded that taxpayer's assertion of his privilege against self-incrimination under the Fifth Amendment was a "blanket refusal" to answer. The Court reasoned that unless specific questions were asked, no claim could be valid and a refusal to answer, albeit one pursuant to an agreed procedure without specific questions, was an impermissible "blanket" claim of the privilege.

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[4] Opinion of the Fifth Circuit Court of Appeals attached hereto as Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to distinguish a "blanket" invocation of a Fifth Amendment claim from the generally accepted procedure of asserting the privilege to specific questions propounded by the investigating body. A writ of certiorari should here be granted for the purpose of defining the scope of the protection afforded a respondent by this Court in *Hoffman* v. *United States,* 341 U.S. 479. *Hoffman* enunciated the prevailing guidelines by which a respondent's invocation of his Fifth Amendment privilege against compelled testimony or production of records is to be judged. Mr. Justice Clark carefully set forth the showing that the person claiming the privilege must make in order for its invocation to be sustained:

> "To sustain the privilege, it need only be evident from the implications of the question, *in the setting in which it is asked,* that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure could result." 341 U.S. at 486, 487. (Emphasis supplied)

The respondent, upon interposing his claim, is not required to prove the hazard in the sense in which a claim is otherwise required to be established because he would then be compelled to surrender the very protection which the privilege is designed to guarantee. *Hoffman,* 341 U.S. at 486. The respondent will only be ordered to reply if it clearly appears to the court that he is mistaken in his claim of the privilege. *Hoffman,* 341 U.S. at 486, cf., *Rogers* v. *United States,* 340 U.S. 367. The determination as to the invocation of the privilege must be governed as much

by the district court's perception of the peculiarities of the case at hand as by the facts in evidence. *Hoffman*, 341 U.S. at 487; *United States* v. *Coffey*, 198 F.2d 438 (3d Cir. 1952); *United States* v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), cert. den. 405 U.S. 917.

The Court below held that the *Hoffman* showing could only be made upon the propounding of specific questions by the investigating body and the interposition of the privilege as to each question so asked.[5]

Whether the question by question approach is the *exclusive* means of properly invoking the Fifth Amendment claim against self-incrimination is an issue that has never been decided by this Court and is a question which has caused conflicting decisions among the various circuits. In *United States* v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), cert. den. 405 U.S. 917, the privilege was sustained in the absence of specific questions being propounded to the respondent in the trial court.

If the question by question approach is not the exclusive means of properly invoking a respondent's Fifth Amendment claim, then the procedure mutually agreed upon with the Government constitutes such facts and circumstances as to sustain the taxpayer-respondent's claim of privilege. Unlike the cases relied upon by the Court below in categorizing the agreed upon procedure as a "blanket re-

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[5] The Court relied for its holding on *United States v. Ponder*, 475 F.2d 37 (5th Cir. 1973), *United States v. Ellsworth*, 460 F.2d 1246 (9th Cir. 1972), *Capitol Products Corp.* v. *Hernon*, 457 F.2d 541 (8th Cir. 1972), and *United States v. Roundtree*, 420 F.2d 845 (5th Cir. 1969) all of which decisions were premised on a respondent's *unilateral* blanket refusal to answer questions or produce documents.

fusal'' to testify, the respondent herein would have appeared, as summonsed, but for the agreement reached with the Internal Revenue Service. By accepting a statement from the respondent that it would accept the assertion of the Fifth Amendment to those inquiries to which it applied, and then denying the respondent the very protection it agreed to give him, the Government has, in effect, deprived the respondent of a clear cut choice between answering or refusing to answer any specific question or producing or refusing to produce any specific document. Cf. *Emspak* v. *United States,* 349 U.S. 190.

Further, there is still another independent ground why the question by question approach of invoking the Fifth Amendment claim is not required in the case at bar for the respondent to properly claim the privilege. The Internal Revenue Code only permits the issuance of a summons to require testimony and/or produce documents which may be relevant and material to a taxpayer's potential tax liabilities. 26 U.S.C. § 7602. The subject summons, which is presumably in conformity with this statute, would, of necessity, have engendered only such questions and requests for documents as were material and relevant to respondent's possible tax liabilities for the years enumerated in the summons. Cf., *Donaldson* v. *United States.* 400 U.S. 517. Thus, the district court was required to view the possible inquiries which would be made pursuant to the summons as being limited, as a matter of law, to such questions and requests for documents as related specifically to respondent's potential tax liabilities for the specified years.

In light of the limited scope and purpose of an Internal Revenue Service summons, the district court took cognizance of the taxpayer's past relationship with the Internal

Revenue Service. Taxpayer had been investigated, indicted and subsequently tried on two criminal tax charges for acts alleged to have taken place during years covered by the instant summons. (App. 76) Any relevant and material tax inquiries would, of legal necessity, encompass the same subject matter as that testified to by taxpayer in the prior criminal tax proceedings, *Donaldson* v. *United States,* 400 U.S. 517, and could elicit answers that might tend to incriminate taxpayer. See e.g., *United States* v. *Beacon Brass Co.,* 344 U.S. 43. The ritualistic formality of specific questions being propounded under these circumstances is not within the letter or spirit of this Court's holding in *Hoffman* v. *United States,* 341 U.S. 479.

This case offers the Court the opportunity to establish when, if ever, the privilege against self-incrimination can be properly invoked by a respondent in the absence of specific questions being propounded to him.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 71-1850-Civ-JLK, 2/17/72

UNITED STATES OF AMERICA,

and

CARL K. ROSEN,
Revenue Agent of the Internal Revenue Service,

Petitioners,

v.

ALVIN I. MALNIK,

Respondent.

ORDER TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

KING, District Judge: This matter came on to be heard on January 10, 1972, upon the Order to Show Cause issued by this Court on December 15, 1971, directing the respondent, Alvin I. Malnik, to appear and show cause why he

should not comply with the terms of the Internal Revenue Service summons served upon him on March 16, 1971. The summons seeks the testimony of Mr. Malnik relative to the tax liabilities of him and his wife for the years 1959, 1960, 1962 and 1963. The summons also seeks to have Mr. Malnik produce for examination all of his personal books, records and papers as well as certain corporate books, records and papers pertaining to his tax liabilities for the same years noted above. The refusal of Mr. Malnik to comply with the summons precipitated this summary enforcement proceeding by the United States and Revenue Agent Rosen.

In his answer to the petition and at the hearing of this matter Mr. Malnik claimed that compliance with the summons would cause him to incriminate himself in violation of the Fifth Amendment to the United States Constitution. Initially, the objection of Mr. Malnik was made in a blanket fashion which is plainly unacceptable. *United States* v. *Roundtree* [69-2 USTC ¶ 9368], 420 F.2d 845, 852 (C.A. 5, 1969).

Although respondent is not under the burden normally incident to proving a claim, it must appear to the Court from the nature of the information and the context in which it is sought, that an injurious disclosure might result. *Hoffman* v. *United States,* 341 U. S. 479, 486 71 S. Ct. 814, 818 (1951). In the instant case, Mr. Malnik has not claimed that he would be incriminated or exposed to prosecution by properly supplying the information sought by the summons. Mr. Malnik has been prosecuted twice for offenses against the revenue laws for the periods under examination. In both instances he was exonerated. In addition, the six-year statute of limitations for prosecution has expired for the period under examination since the last year involved here is 1963.

The respondent contends that in responding to the summons he may make a false statement for which he might then be prosecuted. He, thus, claims that the privilege against self-incrimination protects him from testifying, because in so doing he may testify falsely. However, it is clear that the Fifth Amendment protection pertains only to crimes alleged to have been committed before the time when the testimony is sought. *United States* v. *Orta,* 253 F. 2d 312, 314 (C. A. 5, 1958) cert. denied 357 U. S. 905 (1958). As the Supreme Court stated in *Glickstein* v. *United States,* 222 U. S. 139 (1911), at page 142:

> "* * * the immunity afforded by the constitutional guaranty relates to the past and does not endow the person who testifies with a license to commit perjury."

See also *United States* v. *Kahriger* [53-1 USTC ¶ 9245], 345 U. S. 22, 32 (1952); *Kronick* v. *United States,* 343 F. 2d 436, 441 (C. A. 9, 1965); *United States* v. *Wilcox,* ..... F. 2d ..... (C. A. 5, No. 27370, decided August 9, 1971) (Slip opinion pp. 15-19); *United States* v. *Parker,* 244 F. 2d 943, 947 (C. A. 7, 1957), cert. denied 355 U. S. 836 (1957); *United States* v. *DiGiovanni,* 397 F. 2d 409 (C. A. 7, 1968), cert. denied 393 U. S. 924 (1968); *United States* v. *Winter,* 348 F. 2d 204 (C. A. 2, 1965), cert. denied 382 U. S. 955 (1965). In the recent case of *United States* v. *Provinzano,* 326 F. Supp. 1066, 1068 (E. D. Wisc., 1971), a case involving circumstances which this respondent apparently fears will occur here, the District Court refused to suppress false statements made to agents of the Internal Revenue Service on a claim of Fifth Amendment protection. Applying the same principles outlined above, the Court held that "the law is clear that there is no protection afforded as to future crimes, including the perjury

charged against the defendant in this indictment." *Ibid.*, p. 1068. Accordingly, it is abundantly clear that Mr. Malnik's claim of future misstatement or false statement in complying with this Internal Revenue Service summons as the sole basis for his claim for the protection of the Fifth Amendment privilege is without merit.

It should be recognized that in the event the summoned information is used in a subsequent proceeding, Mr. Malnik is free to raise his objections. *Donaldson* v. *United States* [71-1 USTC ¶ 9173], 400 U. S. 517, 531 (1971); *United States* v. *Blue* [66-1 USTC ¶ 9425], 384 U. S. 251 (1966); *United States* v. *Newman* [71-1 USTC ¶ 9329], 441 F. 2d 65, 170-172 (C. A. 5, 1971).

The Court has considered pleadings, affidavits, exhibits and the memoranda filed by counsel for both sides and is generally advised in the premises. Accordingly, it is hereby

ORDERED:

1. That the respondent, Alvin I. Malnik, shall appear on March 8, 1972, at 10:00 a.m., at Room 522, Federal Building, 51 S. W. First Avenue, Miami, Florida, and produce for examination and for copying by photostatic copying or other mechanical means of reproduction the following books, papers and records:

> General ledgers; general journals; accounts receivable ledgers, escrow ledgers, cash receipts and disbursement journals; fee income invoices and journals; purchase invoices; deposit tickets, cancelled checks and bank statements of the domestic and foreign bank accounts from which accounts you had the right of ownership and withdrawing funds; closing statements, purchase, sales and loan agreements from which agreements you derived income, expenses, loans for yourself and third parties, and interests in vari-

ous enterprises and franchises; broker statements, partnership agreements, journals and ledgers, all specifically related but not limited to your law practice, real estate transactions, mortgage and loan businesses, banking business and investments in closely held and publicly owned corporations. The records summonesed are those of all corporations in which you were either a stockholder, officer, and director and which records are now in your possession or control, including domestic and foreign corporations, including the World Bank of Commerce, Ltd., and the World Bank of Commerce (Overseas), Ltd. of the Bahamas. The foreign banks referred to above include but are not limited to the Barclay Bank and the Bank of World Commerce, Bahamas, and the International Credit Bank, Switzerland.

Such examination shall continue from day to day until completed. It is further

ORDERED that the respondent, Alvin I. Malnik, shall appear before the petitioner, Carl K. Rosen, at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the records produced and the tax liability of Alvin I. Malnik and Deborah C. Malnik for the years 1959, 1960, 1962 and 1963.

In the event that the petitioner and the respondent cannot mutually agree upon a time and place for the taking of the respondent's testimony, then the respondent is ordered to appear at Room 522, Federal Building, 51 S. W. First Avenue, Miami, Florida, at a time designated by the petitioner, Carl K. Rosen; notice of said time and place to be given the respondent Alvin I. Malnik by the petitioner Carl K. Rosen by the sending of a certified letter mailed to the last known address of the respondent Alvin I. Malnik.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 71-1850-CIV-JLK

UNITED STATES OF AMERICA,
and
CARL K. ROSEN,
Revenue Agent of the Internal Revenue Service,
Petitioners,

v.

ALVIN I. MALNIK,
Respondent.

ORDER DISMISSING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

JAMES LAWRENCE KING, District Judge:

Petitioner, Carl K. Rosen, an Internal Revenue Agent, employed in the audit division of the office of the District Director of Internal Revenue, Miami, Florida, is conducting an investigation of the income tax returns of Alvin I. Malnik and his wife, Deborah C. Malnik, for the years 1959, 1960, 1962 and 1963. The Respondent, Alvin I. Malnik, is a resident of Miami Beach, Florida.

On March 16, 1971, Petitioner Rosen issued and served a summons on Respondent Malnik, pursuant to the provisions of Section 7602, Title 26, U.S.C. The summons directed the Respondent to appear before Rosen on March 29, 1971 at the offices of the Internal Revenue Service at Miami, Florida to give testimony relating to the tax liability of Respondent for the years 1959, 1960, 1962 and 1963. It also directed the Respondent to bring with him and produce for examination, the following books, records and papers:

"General ledgers; general journals; accounts receivable ledgers, escrow ledgers, cash receipts and disbursement journals; fee income invoices and journals; purchase invoices; deposit tickets, cancelled checks and bank statements of the domestic and foreign bank accounts from which accounts you had the right of ownership and withdrawing funds; closing statements, purchase, sales and loan agreements from which agreements you derived income, expenses, loans for yourself and third parties, and interests in various enterprises and franchises; broker statements, partnership agreements, journals and ledgers, all specifically related but not limited to your law practice, real estate transactions, mortgage and loan businesses, banking business and investments in closely held and publicly owned corporations. The records summonsed are those of all corporations in which you were either a stockholder, officer, and director and which records are now in your possession or control, including domestic and foreign corporations, including World Bank of Commerce, Ltd., and the World Bank of Commerce (Overseas), Ltd. of the Bahamas. The foreign banks referred to above include but are not limited to the Barclay Bank and the Bank of World Commerce, Bahamas, and the International Credit Bank, Switzerland,"

The date for Respondent's appearance with his records was continued by agreement to and including April 21, 1971. On April 20, 1971, the date for compliance by him was further extended until May 4, 1971. Thereafter, counsel for Respondent conferred with representatives of the Internal Revenue Service and, as a result, it was agreed by both counsel for the Internal Revenue Service and counsel for the Respondent that the time for the compliance with the summons would be continued and that in lieu of the appearance of Respondent that the Internal Revenue Service would accept a written statement directed to Petitioner

Rosen and signed by counsel and Respondent indicating that the Internal Revenue Service would accept a declaration that Respondent would claim his constitutional privileges to such of the questions which were asked of him to which said privilege attached and to those records enumerated in the summons which were in his possession and to which the privilege also attached.

On December 15, 1971, the United States of America and Carl K. Rosen filed the Petition to enforce the Internal Revenue summons pursuant to the authority of Section 7402(b) and 7604(a), Internal Revenue Code, 1954. Based upon said Petition and supporting affidavit of Petitioner Rosen, this Court entered an order upon Respondent to show cause why he should not be compelled to testify and produce the records demanded of him in the summons. A copy of the order was served upon Respondent Malnik who thereupon filed his answer to the Petition.

Petitioner first contends that the procedure agreed to by counsel for Respondent and counsel for the Internal Revenue Service avoiding the necessity of Respondent's personal appearance before Petitioner when both parties were aware that Respondent would, where appropriate, claim his constitutional privilege under the Fifth Amendment, constituted "making a blanket refusal to comply with the summons." Respondent filed an affirmative defense, verified by his counsel, setting forth the understanding arrived at by the representatives of both sides. Under these circumstances, the Court finds that the procedure followed by Respondent in claiming his privilege was understood and agreed in advance. Under the circumstances, such procedure does not constitute "a blanket refusal" or a "blanket" claim of Respondent's privilege under the Fifth Amendment. This agreed procedure was no more than a useful and commendable effort by both sides to avoid going through a mere formality.

On January 10, 1972 the matter came on to be heard upon the show cause order previously issued by this Court. Petitioner urged that Respondent's claim that compliance with the summons would violate his rights under the Fifth Amendment to the Constitution of the United States was not well founded. It urged that it was a matter of record that Mr. Malnik had twice been prosecuted for the tax years which were the subject of the inquiry in the instant Internal Revenue summons and was acquitted of those charges. Respondent had been accused of alleged violations of Section 7206(1), Internal Revenue Code, 1954. In addition, Petitioners urged that the six-year Statute of Limitations for bringing a criminal action for violation of the Internal Revenue laws, 26 U.S.C. 6531, had expired, since the last year under examination in the summons was 1963. Petitioners argued, therefore, that the United States cannot prosecute Malnik for the years involved in the summons. The Government also stated that the United States would not grant immunity from prosecution to Mr. Malnik.

The claim of the privilege under the Fifth Amendment to the Constitution of the United States may be claimed by the Respondent in a proceeding such as this where the Respondent is required to appear pursuant to a summons issued under the authority of the Internal Revenue Code and produce his records and give testimony to an Internal Revenue Agent. Where enforcement of such summons is requested of this Court, however, it is, for the Court to determine whether his silence is justified. The Court can require him to answer only if it clearly appears to the Court that he is mistakened in his claim of privilege. Cf., *Rogers* v. *United States*, 340 U.S. 367, 71 S.Ct. 438 (1951). *Hoffman* v. *United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) is the leading case on the ex-

tent to which a witness may claim his privilege against self-incrimination and the attendant necessity and manner of establishing the incriminating effect of his potential answer. A clear and explicit interpretation of the effect of the *Hoffman* decision was given by Judge Hastie in *United States* v. *Coffey*, 3rd Cir. 1952, 198 F.2d 438, 440:

> "It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, that the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant."

In this connection, the Government, upon oral argument, stated that there was no criminal investigation being conducted of the Respondent Malnik and that his reputation and known history were not such to cause the Court or the Government to believe that answers to questions relating to the instant income tax investigation would tend to incriminate him. Respondent argues, however, that the Government's contention that the Statute of Limitations has expired for criminal prosecution and that having once being acquitted for the years in question forecloses the claim of the privilege, is not well founded as it totally overlooks the ability of the Government to bring additional charges for income tax violations against Mr. Malnik for the same years. We agree. In *United States* v. *Beacon Brass Co.*, 344 U.S. 43 (1952), the defendants were charged with an attempt to defeat and evade taxes owed by Beacon Brass, "by making certain false and fraudulent statements and representations at a hearing and conference be-

fore . . . the United States Treasury Department." The lower Court dismissed the indictment on the ground that these allegations did not make out the offense of "evasion". The Supreme Court, however, reinstated the indictment indicating:

> "The purpose of Section 145(b) [presently 26 U.S.C. Section 7201] which outlaws wilful attempts to evade taxes '*in any manner*' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income." 344 U.S. at 44-46.

Respondent argues that prior to the issuance of the summons and within six years previously, many conferences were held by his attorneys in connection with the prosecution of the criminal charges under 26 U.S.C. § 7206(1). Respondent argues, without admitting, that it is entirely possible that false statements and representations were made at such hearings and conferences before the United States Treasury Department within the last six years. In addition, Respondent argues that certain records and books were presented to the Treasury Department at these hearings and conferences as well as to the Department of Justice. Again, without admitting that such representations, statements, or records were false, Respondent suggests that if in fact they were, as the Supreme Court held true in *Beacon Brass*, he could be prosecuted for a new Internal Revenue offense under 26 U.S.C. § 7201, Internal Revenue Code, 1954, as an attempt to evade taxes by making a false statement for the purpose of concealing unreported income. See also, *United States* v. *Mossley*, 194 F.Supp. 119 (E.D.Pa. 1961), aff'd., 311 F.2d 795 (1963), cert. den., 372 U.S. 966.

In respect to the instant years, Respondent contends that he could be charged with other offenses in addition to the potential violation of additional Internal Revenue Code sanctions, if he was obliged to answer pursuant to the summons and produce the documents in question. Respondent urges, again without admitting having committed the offenses in question, that the Government could charge him with perjury for having testified falsely in his own defense at the criminal proceedings two years ago and that other statements made by him might be claimed to be a violation of Section 1001, Title 18 U.S.C. Both these suggestions are founded on the premise that if obliged to answer pursuant to this summons, he would testify truthfully and such truthful answers could establish a prior untruthful answer given by him.

The Government argues that it is insufficient for Respondent to merely suggest that the incrimination is possible. The Government questions the Respondent's failure to "prove" that these potential prosecutions are in fact a real possibility. The Government, of course, misconstrues the meaning of *Hoffman* v. *United States,* supra, and its progeny. Mr. Justice Clark in *Hoffman* took pains to explain the "proof" obligation of the person claiming the privilege:

> "However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in Court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclos-

> ure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the particularities of the case and by the facts actually in evidence.' See Taft J., In ex parte Irvine, 74 Fed. 954, 960 (CCSD Ohio 1896)." 341 U.S. at 486,-487.

Again, we agree with the reasoning in *United States* v. *Coffey,* supra. pp. 440-41:

> "Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached and achieved by obscure and unlikely lines of inquiry."

We conclude that under the setting in which the questions are sought to be asked and in light of the potential dangers pointed out by Respondent's counsel, it is apparent that even seemingly innocuous questions relating to Respondent's tax liabilities for the instant tax years and the production of his records clearly suggest potential connecting links through which Respondent's answers might lead to and might result in his incrimination.

Respondent concedes that the protection of the privilege applies only to past crimes alleged to have been committed prior to the time of the summoned testimony. *United States* v. *Orta,* 253 F.2d 312, 314 (5th Cir. 1958), cert. denied, 357 U.S. 905 (1958). As the Supreme Court stated in *Glickstein* v. *United States,* 222 U.S. 139 (1911), at page 142:

> "* * * the immunity afforded by the Constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury."

This Court initially entered an order to enforce the Internal Revenue summons on the theory that the Respondent was claiming fear of future violations of law as the predicate for his assertion of the privilege. Respondent was given an opportunity to reargue the issue and upon such reargument clearly stated, through his counsel, that the potential prosecution against which the claim of privilege was asserted related not to future violations but to the past potential violations as above analyzed. Respondent argues that as in *United States* v. *Hoffman,* 260 F.Supp. 566 (M.D.Pa. 1966), to require him to testify under oath and to tell the truth might expose him to prosecution and furnish the proof that he *had given* false statements and committed violations of criminal provisions of the Internal Revenue Code and the Criminal Code. (26 U.S.C. and 18 U.S.C.) As in *United States* v. *Hoffman,* supra, we agree that Respondent will not be ordered to testify and the petition should be denied.

The Government contends that Petitioner Rosen is an Internal Revenue agent whose function is not the collection of information for criminal prosecution and that therefore the investigation being conducted by him pursuant to which he has issued this summons is such that would not allow the claim of the privilege. We find, however, that from all of the circumstances adduced at the hearings in this case, and in the setting in which the production of the records and questions are to be asked, that the potential incrimination raised by the Respondent is a real and valid possibility. There is no prohibition, but, to the contrary, there is an *obligation* of the Revenue Agent to forward for criminal investigation and ultimate prosecution any potential violations of the law of which he may become aware. It is apparent that in this setting and in light of

Respondent's prior testimony at trial, his previous production of documents, and the former representations made to agents of the Government, that Petitioner Rosen would indeed be expected to scrutinize and compare any statements made pursuant to the summons to those previously made by the Respondent. Furthermore, we can anticipate that Petitioner will review the records previously furnished by Respondent to representatives of the Government or offered by him as evidence in his criminal trials. With that in mind, and considering the potential incrimination urged by Respondent's counsel, it is the finding of this Court that the claim of the privilege is well-founded in spite of the fact that Petitioner Rosen is not a criminal investigator and is not now conducting a criminal investigation.

Finally, the Government argues that this Court should consider and be bound by *United States* v. *Newman,* 5th Cir. 1971, 441 F.2d 165, 174, fn 29, *United States* v. *Prudden,* 5th Cir. 1970, 424 F.2d 1021, *Mathis* v. *United States,* 5th Cir. 1967, 376 F.2d 595, rev'd 391 U.S. 1, 20 L.Ed.2d 381, 88 S.Ct. 1503 (1968), and *United States* v. *Ponder,* 5th Cir. 1971, 444 F.2d 816. Each of these cases is concerned with the type and necessity of warnings given to potential defendants prior to any inquiry made by Government agents. The issue here is not the question of giving the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). These cases go to the question of whether a warning may be required in order to later ascertain whether statements made by the witness were given voluntarily. In the instant proceeding, the witness need not claim any obligation to receive the warnings, since he is attempting to avail himself of his constitutional privilege and avoid giving testimony and

producing his records. These cases do not hold that under circumstances such as these, Respondent is foreclosed from claiming his privilege. We therefore find these cases to be inapposite and conclude, as previously stated, in the setting in which the questions are to be asked and the records to be produced, and based upon all of the pleadings, affidavits, exhibits and memoranda filed by counsel, together with their respective arguments, that the privilege is well claimed and that the Petition should be denied.

APPENDIX C

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1974.

UNITED STATES of America and Carl Rosen, Revenue Agent of the Internal Revenue Service,
Plaintiffs-Appellants,
v.
Alvin I. MALNIK, Defendant-Appellee.

No. 72-3153.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, DYER and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge:

This is an appeal from an order of the district court dismissing a petition to enforce an Internal Revenue Service summons issued under 26 U.S.C. §7602.[1] The summons

[1] Sec. 7602 provides as follows:

For the purpose of ascertaining the correctness of any return making a return where none has been made, determining the liability of any person for any internal revenue tax or liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any

was issued on March 16, 1971, by Carl K. Rosen, an Internal Revenue Agent, to taxpayer Alvin I. Malnik, requiring him to give testimony and produce books and records[2] for the investigation of his tax liability for the

(Footnote continued)

person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[2] The summons required Malnik to produce the following:

General ledgers; general journals; accounts receivable ledgers; escrow ledgers, cash receipts and disbursement journals; fee income invoices and journals; purchase invoices; deposit tickets, cancelled checks and bank statements of the domestic and foreign bank accounts from which accounts you had the right of ownership and withdrawing funds; closing statements, purchase, sales and loan agreements from which agreements you derived income, expenses, loans for yourself and third parties, and interests in various enterprises and franchises; broker statements, partnership agreements, journals and ledgers, all specifically related but not limited to your law practice, real estate transactions, mortgage and loan businesses, banking business and investments in closely-held and publicly owned corporations. The records summonsed are those of all corporations in which you were either a stockholder, officer, and director and which records are now in your possession or control including domestic and foreign corporations, including the World Bank of Commerce. Ltd. and the World Bank of Commerce (Overseas) Ltd. of the Bahamas. The foreign banks referred to above include but are not limited to the Barclay Bank and the Bank of World Commerce, Bahamas and the International Credit Bank, Switzerland.

years 1959, 1960, 1962 and 1963. Mr. Malnik was scheduled to appear before Agent Rosen on March 29, 1971, but the appearance date was postponed twice. Finally, Mr. Malnik's attorney, Harvey M. Silets, conferred with the Assistant Regional Counsel for the Internal Revenue Service, and it was mutually agreed that taxpayer Malnik would not appear personally at all. Instead, the Internal Revenue Service agreed to accept a written statement signed by taxpayer Malnik and his attorney to the effect that, had taxpayer personally appeared, "he would have asserted his appropriate constitutional privileges to all relevant and material questions proponded to him and to the production of such of the records therein enumerated in his possession." On the basis of this letter, the Internal Revenue Service did not require taxpayer to appear or to produce books and records under the summons. More than seven months after this mutual agreement, however, on December 7, 1971, the Internal Revenue Service filed a petition to enforce the summons. Although the district court first ordered compliance with the summons, on rehearing the court denied enforcement and dismissed the petition.

The following issues are presented on appeal: (1) whether the mutual agreement between the Internal Revenue Service and taxpayer Malnik constitutes a "blanket" refusal to answer questions based on the Fifth Amendment, and (2) whether the district court properly sustained taxpayer's Fifth Amendment objection to produce the requested books and records.

Although we disagree with the reasons underlying the district court's disposition of this case, we affirm.

I.

In Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951), the Supreme Court enunciated the standard for measuring when a witness may properly claim his right against self-incrimination, and thus refuse to respond to questioning.

> ". . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' "

Id., at 486-487; *see* United States v. Coffey, 198 F.2d 438, 440 (3rd Cir., 1952). A proper application of this standard implicitly requires that specific questions be propounded by the investigating body, and the claim of the right against self-incrimination must be claimed in response to each. A "blanket" refusal to answer all questions is unacceptable. United States v. Ponder, 475 F.2d 37, 39 (5th Cir., 1973); United States v. Ellsworth, 460 F.2d 1246, 1248 (9th Cir., 1972); Capitol Products Corp. v. Hernon, 457 F.2d 541, 542-543 (8th Cir., 1972); United States v. Roundtree, 420 F.2d 845, 852 (5th Cir., 1969). *See also* United States v. Johnson, 465 F.2d 793, 796 (5th Cir., 1972); Wright & Miller, Federal Practice and Procedure, § 2018, at 142 (1970). Thus a subject of a subpoena should appear before the interrogating officer and under oath specifically claim his constitutional rights as to particular questions while answering others not presenting a threat of self-

incrimination. *See* United States v. Ellsworth, *supra,* 460 F.2d at 1248; United States v. Bell, 448 F.2d 40, 42 (9th Cir., 1971); Daly v. United States, 393 F.2d 873, 877-878 (8th Cir., 1968); United States v. Terry, 362 F.2d 914, 917 (6th Cir., 1966); United States v. Harmon, 339 F.2d 354, 359 (6th Cir., 1964), cert. den. 380 U.S. 944, 85 S.Ct. 1025, 13 L.Ed.2d 963; In re Turner, 309 F.2d 69, 71 (2nd Cir., 1962); Landy v. United States, 283 F.2d 303, 304 (5th Cir., 1960); United States v. Solon, 294 F.Supp. 880, 882 (E.D. N.Y., 1968), aff'd 405 F.2d 1211, 1212 (2nd Cir., 1968). On the basis of a record thus established, a reviewing court could scrutinize this record and determine whether the witness is mistaken in his claim " 'and that the answers *cannot possibly* have such tendency' to incriminate." Hoffman v. United States, *supra,* 341 U.S. at 488, quoting Temple v. Commonwealth, 75 Va. 892, 989 (1881).

Malnik first contends that the mutuality of the agreement with the Internal Revenue Service is different from one party's unilateral objection to answer all questions, and thus under these unique facts no blanket refusal to respond to questioning exists. We simply cannot agree. Malnik's Fifth Amendment objection to comply with the subpoena is presented to us in the absence of specific questions that may or may not tend to incriminate. To sustain his objection this court, as well as Malnik, would have to completely and accurately anticipate every question. Regardless of the mutuality of the agreement, we think such an objection constitutes a blanket refusal to comply with the subpoena and therefore is unacceptable.

Malnik also urges that the district court correctly applied the *Hoffman* standard and therefore properly dismissed the petition for enforcement of the subpoena. Because the trial judge "must be governed as much by his

personal perception of the peculiarities of the case" in making the determination whether the privilege against self-incrimination may be sustained, Hoffman v. United States, *supra*, 341 U.S. at 487, quoting Ex parte Irvine, 74 F. 954, 960 (C.C.S.D.Ohio, 1896), Malnik argues that the surrounding facts and circumstances of this case justify the court's dismissal of the enforcement petition.[3] We do not believe, however, that the peculiarities of this case compel a dismissal of the petition. It is simply impossible to anticipate every question that might be asked and conclude that each would present a distinct possibility of self-incrimination if answered by the witness. This is not to say that if Malnik testifies and produces documents, he

[3] Elaborating on this contention, Malnik describes four aspects of this case that are particularly peculiar. First, Malnik points out the past relationship between himself and the Internal Revenue Service. Malnik has previously been tried and acquitted on two criminal tax charges relating to the same years under investigation by the instant summons. Second, taxpayer Malnik urges that there is a possibility of incrimination under United States v. Beacon Brass Co., 334 U.S. 43, 73 S.Ct. 77, 97 L.Ed. 61 (1952). Under *Beacon Brass*, Malnik might be subject to prosecution for making false representations to government agents in an attempt to evade taxes. Additionally, Malnik asserts that his answering questions would expose him to possible charges for perjured testimony given in the prior trial on criminal tax charges and for making false statements to federal officers. 18 U.S.C. § 1001 (2970). Third, Malnik says the government's contention that there is no possibility of instituting criminal proceedings against him as a result of the investigation is unfounded. Even though Agent Rosen's only function is to investigate civil tax liability, he has an obligation to report any possible criminal violations of which he may learn during the investigation. Finally, Malnik argues that the question by question approach is not the exclusive means of properly invoking the Fifth Amendment claim against self-incrimination.

may not object to every question. It is just that we cannot speculate and say that any response to all possible questions would or would not tend to incriminate the witness. Therefore, we think that Malnik should have been required to appear pursuant to the subpoena and raise his constitutional claim with regard to specific questions.

II.

The second issue is whether the production of books and records of designated corporations and partnerships is subject to Malnik's Fifth Amendment claim against self-incrimination. With regard to corporations, it is well established that a corporate officer or custodian of books and records must produce such records even though they might tend to incriminate the witness. United States v. White, 322 U.S. 694, 699, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); Wilson v. United States, 221 U.S. 361, 384, 31 S.Ct. 538, 55 L.Ed. 771 (1911). This rule is premised upon the governmental necessity to investigate such organizations, presumably conceived for the benefit of the public. Hale v. Henkel, 201 U.S. 43, 74-75, 26 S.Ct. 370, 50 L.Ed. 652 (1906). The one exception to this rule, which was relied on by the district court,[4] is when the records

[4] As an alternative ground for refusing to enforce the summons with regard to corporate documents, the district court held that it was too broad and unclear. We recognize that enforcement of an unclear and overly broad summons would violate the Fourth Amendment's proscription of unreasonable searches and seizures. United States v. Morton Salt Co., 338 U.S. 632, 652-653, 70 S.Ct. 357, 94 L.Ed 401 (1950); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed. 614 (1946). And we are also aware that a district court's determination that a summons is overbroad or unclear is generally within its discretion. United States v. Ruggeiro, 425 F.2d 1069, 1071 (9th Cir., 1970); Dunn v. Ross,

are held by the corporate officer or custodian in a personal, as opposed to a representative, capacity.[5]

(Footnote continued)
356 F.2d 664, 667 (5th Cir., 1966). But we do not require the revenue agent to describe the books and records he seeks in minute detail. The documents must be described only with "reasonable particularity" so as to give the witness sufficient information to determine which records are to be produced. First National Bank of Mobile v. United States, 160 F.2d 532, 535 (5th Cir., 1947); *see* United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 131 (3rd Cir., 1967), cert. den. 390 U.S. 921, 88 S.Ct. 854, 19 L.Ed.2d 981. Moreover, if a summons appears to be overly broad and therefore unenforceable, the district court may modify the summons and delineate appropriate limitations so that it sufficiently describes the documents sought. Dunn v. Ross, *supra*, 356 F.2d at 667; Venn v. United States, 400 F.2d 207, 212 (5th Cir., 1968); Falsone v. United States, 205 F.2d 734, 739 (5th Cir., 1953); *see* United States v. Bowman, 435 F.2d 467, 470, n.6 (3rd Cir., 1970). We emphasize, however, that nothing we say in this regard authorizes the production of documents that are irrelevant or immaterial to the investigation.

Additionally, we are not persuaded by Malnik's reliance on United States v. Solomon, 71-1 USTC ¶ 9284 (S.D. Fla., June 12, 1970), aff'd. 437 F.2d 110 (5th Cir., 1971). In *Solomon* there was a demand for corporate records of a particular corporation, but there were two corporations with almost identical names. That problem does not seem to arise under these facts because the IRS requests the production of documents of all corporations.

[5]In United States v. White, *supra*, 322 U.S. at 699, the Supreme Court noted the personal character of the right against self-incrimination.

> "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652; Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771; Essgee Co. v. United States, 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917. See also United

Significantly, however, the distinction between personal and representative capacity has been narrowly defined. Even when the corporation has had only one stockholder, the courts have declined to hold that the corporate records and books were held in a personal capacity. Wright v. Detwiler, 345 F.2d 1012 (3rd Cir., 1965); Hair Industry, Inc. v. United States, 340 F.2d 510, 511 (2nd Cir., 1965), cert. den. 381 U.S. 950, 85 S.Ct. 1804, 14 L.Ed.,2d 724 (1965); United States v. Guterma, 272 F.2d 344, 346 (2nd Cir., 1959); Christianson v. United States, 226 F.2d 646, 653 (8th Cir., 1955); *see* United States v. Crespo, 281 F. Supp. 928, 936-937 (D.C.Md., 1968). The only case we have found in which a corporate officer or custodian can possess corporate records in a personal capacity, and consequently claim the privilege against self-incrimination, is when it is a foreign corporation. Application of Daniels, 140 F. Supp. 322, 327-328 (S.D.N.Y., 1956).

Relying initially on the government's failure to deny Malnik's contention that he held the corporate records in a personal capacity, the district court refused to require compliance with the summons. But we feel that this reason is an insufficient basis for denying enforcement of the peti-

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(Footnote continued)

States v. Invader Oil Corp., D.C., 5 F.2d 715. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations."

tion under the peculiar circumstances of this case. Indeed, if Malnik can demonstrate that he holds these records in a personal capacity, he should be provided with the opportunity to do so. We cannot agree, however, that Malnik set forth sufficient evidence to show that the records were held in a personal capacity and thus subject to his claim against self-incrimination.

With regard to partnership documents, the Supreme Court in United States v. White, supra, set forth the test for determining whether such books and records are subject to the claim against self-incrimination. Essentially, the documents are not subject to Fifth Amendment rights if "the organization has a character so impersonal in scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interest of its constituents." *Id.*, 322 U.S. at 701. Malnik contends that, because he claimed his rights under the Fifth Amendment, it is now encumbent upon the government to come forward and prove the impersonal character of the partnership. *See* United States v. Schoendorf, 307 F.Supp. 1034, 1037-1038 (E.D.Wis., 1970); Application of Weiss, 283 F.Supp. 97, 98 (E.D.N.Y., 1968); United States v. Cogan, 257 F.Supp. 170, 172 (S.D.N.Y., 1966). To the contrary, the government contends that, since under *Hoffman* the person invoking the privilege must show that it was properly invoked, the claimant here must demonstrate the personal character of the organization before he is entitled to claim the right against self-incrimination. *See* United States v. Quick, 336 F.Supp. 744, 745-746 (E.D. N.Y., 1972).

Presumably, the district court denied enforcement of the summons with respect to partnership records for the same reason it denied enforcement regarding corporate records. But the trial court's record does not disclose whether the partnership was of such a personal character so as to subject the books and records to the partners' rights under the Fifth Amendment. Because the district court failed to make a clear determination in regard to the partnership records, we decline to make that determination now.

III.

While we disagree with the district court's dismissal of the petition to enforce the subpoena, there is still a basis on which to affirm its ultimate conclusion. We believe that the mutual agreement between the IRS and Malnik that he need not appear under the summons constitutes a waiver of any rights the IRS may have had.[6] The IRS specifically agreed that Malnik need not appear, and yet seven months after entering into this agreement they asked the district court to compel him to comply with the summons. Moreover, we feel that the agreement constitutes a waiver not only with regard to Malnik's testimony, but also regarding the production of documents, for we find nothing in the agreement that would limit its meaning to cover only testimony. Therefore, based solely on the government's indiscriminate agreement that Malnik need not comply with the demand of the summons, we affirm.

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[6] Because we disagree with the reasoning of the district court, but affirm its judgment on a wholly different ground, we do not think that the doctrine of *res judicata* would preclude the IRS from issuing another subpoena pertaining to the same subject matter. J. Moore, Federal Practice ¶ 0.416 [2], at 2232 (1965).

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1530

ALVIN I. MALNIK, PETITIONER

v.

UNITED STATES OF AMERICA
AND CARL ROSEN, REVENUE AGENT OF THE
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On March 16, 1971, Carl K. Rosen, an Internal Revenue agent, issued a summons to petitioner under Sections 7602 and 7603 of the Internal Revenue Code of 1954, requiring him to appear for questioning and to produce certain designated documents for inspection relating to his tax liabilities for 1959, 1960, 1962 and 1963 (Pet. App. C 17-19). After consulting with Internal Revenue Service officials, petitioner's counsel informed the Internal Revenue Service by letter, acknowledged by petitioner, that "had [the petitioner] personally appeared [pursuant to the summons], 'he would have asserted his appropriate constitutional privileges to all relevant and material questions propounded to him and to the production of such of the records therein enumerated in his possession' "

(Pet. App. C 19). Interpreting this statement as an anticipatory "blanket" refusal to answer all questions, the Internal Revenue Service then waived the petitioner's appearance pursuant to the summons (Pet. App. C 19).

Thereafter, the Internal Revenue Service brought this action to enforce the summons, urging that the petitioner had improperly invoked the Fifth Amendment privilege on a "blanket" basis (Pet. App. B 8). In his defense of the summons enforcement proceeding, petitioner urged that he had properly invoked the Fifth Amendment and that, therefore, the petition for enforcement should be dismissed. The only showing petitioner made, however, was that (1) he had been previously tried and acquitted for tax evasion for two of the years involved; (2) during the course of the criminal trial, he had made representations to the government and had given sworn testimony; and (3) since his civil liability for two of the four years in question was under issue, giving responsive answers to any questions or producing any documents might tend to incriminate him (Pet. App. B 8-9).

After initially ordering the enforcement of the summons (Pet. App. A 1-5), the district court reconsidered its decision and ultimately refused to enforce the summons on two alternative grounds: First, it held that petitioner had properly invoked his Fifth Amendment privilege because either responding to any questions the Internal Revenue Service might ask or producing the documents called for might tend to incriminate petitioner. Secondly, the court held that the summons was overly broad and therefore unenforceable (Pet. App. B 6-16).

On appeal, the court of appeals affirmed. However, its decision was premised on the fact that the Internal Revenue Service had waived its right to seek enforcement because of its agreement with petitioner permitting

him to dispense with appearance in accordance with the summons. In its opinion, the court of appeals stated that the reasons given by the district court for refusing to enforce the summons were erroneous. The court of appeals ruled that petitioner had improperly invoked his Fifth Amendment privilege on a "blanket" basis because it could not be concluded from the record that production of the requested information might tend to incriminate petitioner. Moreover, the court of appeals stated that the summons was not overly broad (Pet. App. C 17-27).

2. The judgment of the court of appeals affirming the district court's refusal to enforce the summons is in petitioner's favor. Nevertheless petitioner seeks review by this Court because he disagrees with the conclusion of the court of appeals that he had not properly invoked his Fifth Amendment privilege. Although 28 U.S.C. 1254(1) permits "any party" to a case in the court of appeals to apply for a writ of certiorari, the granting of review in these circumstance would be inconsistent with this Court's settled practice of refusing to entertain an appeal (other than a cross petition) by a party successful in obtaining a final judgment in his favor in the court below. *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; *Lindheimer* v. *Illinois Tel. Co.*, 292 U.S. 151, 176; *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645. As the Court stated most recently in *United States* v. *Shirey*, 359 U.S. 255, 261, n. 5, "[t]his Court reviews judgments, not arguments assailing them or seeking to sustain them." The exceptional situation of certiorari before judgment is of course not present here; nor is the exception for cross petitions applicable since the government has not petitioned for certiorari from the judgment in petitioner's favor (and the time for petitioning has expired).

In light of the court of appeals' explicit disagreement with the district court's opinion as to the availability of the Fifth Amendment privilege on a "blanket" basis, it is plain that petitioner is seeking review at this time in order to determine the availability of the privilege in response to a possible future summons by the Internal Revenue Service. The issues with respect to such a hypothetical summons are not ripe for review at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.